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NO. 70138-0-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

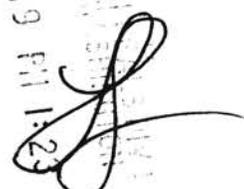
ESTERA GRADINARU,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH
SERVICES,

Respondent.

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON


BRIEF OF RESPONDENT

ROBERT W. FERGUSON
Attorney General

ANGELA COATS MCCARTHY
Assistant Attorney General
WSBA No. 35547
PO Box 40124
Olympia, WA 98504
(360) 586-6484

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

 1. Is it financial exploitation under Chapter 74.34 RCW when an individual takes and ingests a vulnerable adult’s medication for his or her own purpose?2

 2. Is it financial exploitation under Chapter 74.34 RCW if an individual improperly or illegally uses a vulnerable adult’s property to implement a desired, self-destructive purpose?2

 3. Must financial exploitation under Chapter 74.34 RCW only involve monetary profit or monetary advantage?2

III. COUNTERSTATEMENT OF THE CASE2

 A. The Undisputed Facts Show That Ms. Gradinaru Took A Vulnerable Adult’s Medication To Serve Her Own Purpose.....2

 1. Ms. Gradinaru Has A Long History Of Mental Illness And Suicide Attempts3

 2. Ms. Gradinaru Took And Ingested A Vulnerable Adult’s Medication4

 B. The Adult Family Home Licensing Investigation Verified Ms. Gradinaru Took Elaine’s Medication5

 C. The Department’s Resident And Client Protection Program Found Ms. Gradinaru Took Elaine’s Medication for Her Own Use6

 D. The Administrative Proceeding7

IV. ARGUMENT8

A.	The Court Reviews The Final Agency Order, Not The Administrative Law Judge’s Decision	8
B.	Standard Of Review	9
C.	Estera Gradinaru’s Actions Constitute Financial Exploitation.....	11
D.	An “Advantage Or Profit” Does Not Require An Objectively Positive Outcome	14
E.	Monetary Benefit Or Monetary Profit Are Not Required To Meet The Statutory Definition Of Financial Exploitation.....	16
V.	CONCLUSION	19

TABLE OF AUTHORITIES

Cases

<i>Heinmiller v. Dep't of Health</i> , 127 Wn.2d 595, 903 P.2d 433 (1995), <i>cert. denied</i> , 518 U.S. 1006 (1996).....	9, 10
<i>Hillis v. Dep't of Ecology</i> , 131 Wn.2d 373, 932 P.2d 139 (1997).....	10
<i>Ikeda v. Curtis</i> , 43 Wn.2d 449, 261 P.2d 684 (1953).....	13
<i>In re Estate of Blessing</i> , 174 Wn.2d 228, 273 P.3d 975 (2012).....	12
<i>Kitsap Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.</i> , 138 Wn. App. 863, 158 P.3d 638 (2007).....	2
<i>Kraft v. Dep't of Social and Health Services</i> , 145 Wn. App. 708 (2008).....	11
<i>Macey v. Empl. Sec. Dep't</i> , 110 Wn.2d 308, 752 P.2d 372 (1988).....	10
<i>Northwest Steelhead & Salmon Coun. of Trout Unlimited v. Dep't of Fisheries</i> , 78 Wn. App. 778, 896 P.2d 1292 (1995).....	9
<i>Peacock v. Pub. Disclosure Comm'n</i> , 84 Wn. App. 282, 928 P.2d 427 (1996).....	10
<i>State Farm Fire and Cas. Co. v. Huynh</i> , 92 Wn. App. 454, 963 P.2d 854 (1998).....	13
<i>State v. Hall</i> , 168 Wn.2d 726, 230 P.3d 1048 (2010).....	15
<i>Tapper v. Empl. Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	9, 10

<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	19
<i>U.S. v. Hoffman</i> , 154 Wn.2d 730, 116 P.3d 999 (2005).....	17

Statutes

Former RCW 74.34.020(6) (2010)	11, 17
Former RCW 74.39A.050(8) (2011)	11
Laws of 2011, ch. 170.....	18
RCW 34.05	8
RCW 34.05.558	9
RCW 34.05.562	9
RCW 34.05.570(1)(a)	10
RCW 34.05.570(1)(d).....	10
RCW 34.05.570(3).....	9, 10
RCW 34.05.570(3)(d).....	10
RCW 74.34	11, 12
RCW 74.34.020(6).....	11
RCW 74.34.020(6)(c).....	18
RCW 74.39A.056(2).....	11

Other Authorities

<i>Webster's Ninth New Coll. Dictionary</i> (1987).....	12
---	----

Regulations

WAC 388-76-11000..... 6
WAC 388-76-11005..... 6

I. INTRODUCTION

Estera Gradinaru, a registered nurse and adult family home operator, had a history of mental illness and multiple suicide attempts. In October 2010, Ms. Gradinaru ingested an adult family home resident's morphine, which was part of the resident's hospice comfort care medication. Ms. Gradinaru later claimed she used the resident's medication as part of a failed suicide attempt. The Department of Social and Health Services (Department) revoked her adult family home license, and made a civil finding of financial exploitation against her, because she took a vulnerable adult's medication for her own use.

The Department's Review Decision and Final Order upheld the finding of financial exploitation against Ms. Gradinaru because her actions met the statutory definition of financial exploitation. The King County Superior Court correctly determined there were no grounds under the Administrative Procedure Act to overturn the agency's decision.

Ms. Gradinaru now appeals to this Court claiming that the statutory definition of financial exploitation does not support the determination that she financially exploited a vulnerable adult because attempting to commit suicide is not objectively profitable or advantageous. This Court should affirm the Department's Review Decision and Final Order because Ms. Gradinaru took a vulnerable adult's medication for her

own use. Regardless of whether her intention was to commit suicide, or something else, she illegally or improperly used the property of a vulnerable adult to further her own purpose. Interpreting the definition of financial exploitation in the manner that Ms. Gradinaru suggests would unnecessarily erode a protection for vulnerable adults, which is not what the Legislature intended.

II. COUNTERSTATEMENT OF THE ISSUES

1. Is it financial exploitation under Chapter 74.34 RCW when an individual takes and ingests a vulnerable adult's medication for his or her own purpose?
2. Is it financial exploitation under Chapter 74.34 RCW if an individual improperly or illegally uses a vulnerable adult's property to implement a desired, self-destructive purpose?
3. Must financial exploitation under Chapter 74.34 RCW only involve monetary profit or monetary advantage?

III. COUNTERSTATEMENT OF THE CASE

A. The Undisputed Facts Show That Ms. Gradinaru Took A Vulnerable Adult's Medication To Serve Her Own Purpose

Ms. Gradinaru challenges no findings of fact in her appeal. Having not assigned error to any of them, the findings are verities on appeal. *Kitsap Cnty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn. App. 863, 872, 158 P.3d 638 (2007).

1. Ms. Gradinaru Has A Long History Of Mental Illness And Suicide Attempts

Estera Gradinaru suffers from depression. In August of 2002, she was admitted to the psychiatric unit at Overlake Hospital after she tried to commit suicide by taking 23 Motrin tablets. She was hospitalized for one and a half days, and was discharged on her request. Administrative Record (AR) at 2. In October 2009, Ms. Gradinaru was in the middle of divorce proceedings, had financial problems, and was very stressed because her husband had threatened to take their two young children away from her when the divorce became final. AR at 2-3. On October 2, 2009, she was admitted to the psychiatric unit of Overlake Hospital, after she reportedly tried to commit suicide again, this time by taking an overdose of Oxycodone. AR at 3.

At that time, Ms. Gradinaru's treating physician encouraged her to delay her hospital discharge, and "strongly encouraged her to consider the partial-day hospitalization program." AR at 3. She declined this medical advice, citing financial concerns, and asked to be discharged on October 6, 2009. *Id.* Ms. Gradinaru was discharged with various mental health diagnoses and prescriptions for medications. *Id.*

2. Ms. Gradinaru Took And Ingested A Vulnerable Adult's Medication

In October 2010, Ms. Gradinaru was the co-owner of the Bellevue Rose Adult Family Home (Bellevue Rose AFH). Elaine was a resident of that long term care facility. AR at 2. Elaine was 91 years old, suffered from dementia, and was in hospice care. AR at 2. As a result, Elaine's Negotiated Care Plan was amended to provide that her hospice nurse would dispense her medications to her. Elaine's medications included "comfort medications," prescribed for end-of-life treatment. They were intended to address anxiety, agitation, shortness of breath, and pain. Included in the comfort medications was a vial of liquid morphine. *Id.*

At that time, Ms. Gradinaru was emotionally distressed about her divorce, and was also in physical pain. She wanted her pain to stop. AR at 4. Her father, who is also a licensed adult family home owner, called her and asked for her to go to the pharmacy to pick up some comfort medications for a resident in his home who was also on hospice care. *Id.* Instead, Ms. Gradinaru took Elaine's morphine, and went to a local Park-and-Ride station. *Id.* She took one-half capful of the morphine, which made her feel sleepy. *Id.* She called her ex-husband, and asked if she could come to his home to sleep. He refused. *Id.*

Ms. Gradinaru's father soon arrived at the Park-and-Ride and took her back to his home. *Id.* One-half capful of morphine would have eased Ms. Gradinaru's physical pain and made her feel sleepy, but would not have killed her. *Id.*

Ms. Gradinaru was still in physical pain when she arrived at her father's home, so her brother took her to Overlake Hospital. She was initially admitted to the hospital based upon her physical pain. After she told the hospital staff treating her that she had taken the morphine in a failed suicide attempt, she was admitted to the psychiatric unit. *Id.* It is uncontested that Ms. Gradinaru took Elaine's morphine to ease her own physical and emotional distress. AR at 4-5. Ms. Gradinaru's physical pain is closely correlated to her psychological pain and her physical distress is exacerbated when she is emotionally distressed. AR at 4.

B. The Adult Family Home Licensing Investigation Verified Ms. Gradinaru Took Elaine's Medication

The Department received an anonymous complaint alleging that Ms. Gradinaru took an adult family home resident's medications in a failed suicide attempt. AR at 3. Katherine Ander is an adult family home licensing complaint investigator, and she went to the Bellevue Rose AFH to investigate. *Id.* When Ms. Ander arrived, Elaine was the only resident who was prescribed a narcotic drug, morphine, to address

end-of-life issues. *Id.* Ms. Ander looked at Elaine's vial of morphine. The seal on the vial was broken, and it appeared as if approximately one cc of morphine was missing. AR at 4. Ms. Ander interviewed Elaine's hospice nurse and learned that Elaine did not yet need any of the comfort medications that had been prescribed for her. *Id.* Ms. Ander later interviewed Ms. Gradinaru after she had been discharged from Overlake Hospital. *Id.* Ms. Gradinaru admitted to taking and ingesting Elaine's morphine and that, on the date she took the morphine, she was in physical and emotional pain and she wanted it to stop. Verbatim Report of Proceedings (VRP) at 23.

C. The Department's Resident And Client Protection Program Found Ms. Gradinaru Took Elaine's Medication for Her Own Use

The Resident and Client Protection Program within the Department investigates allegations that adult family home residents have been abused, neglected, or financially exploited by individuals working in an adult family home. WAC 388-76-11000.¹ Mary Moran is the Resident and Client Protection Program Investigator who was

¹ If the allegations against an individual are substantiated, the Department makes a preliminary finding of abuse, neglect, or exploitation. *See* WAC 388-76-11005. Any individual with access to a long-term care facility is eligible for a finding of abuse, neglect, exploitation, or financial exploitation, regardless of whether the individual is a licensed provider. WAC 388-76-11000. Specifically, providers, employees of the adult family home, entity representatives, anyone affiliated with a provider, and caregivers, are all subject to such findings. *Id.*

assigned to investigate the situation where Ms. Gradinaru took Elaine's medication. Ms. Gradinaru told Ms. Moran that she took Elaine's morphine and ingested it. VRP at 60-61. Based on her investigation, Ms. Moran concluded that Elaine was a vulnerable adult, Ms. Gradinaru ingested some of Elaine's medications for her own purpose, and Elaine did not benefit or profit from Ms. Gradinaru's actions. AR at 5. Based on this investigation, the Department found that Ms. Gradinaru financially exploited Elaine when she took something of value, specifically the morphine medication, for her own use. *See* AR at 103.

D. The Administrative Proceeding

The Department notified Ms. Gradinaru of the finding of financial exploitation against her, and her right to appeal. Ms. Gradinaru appealed both the revocation of her adult family home license and the finding of financial exploitation to the Office of Administrative Hearings. VRP at 5. The issue of the adult family home license was resolved with a dismissal of the appeal. VRP at 5-6. The only issue remaining for the administrative hearing was whether the finding of financial exploitation was correct.

During the hearing, the facts were largely stipulated and Ms. Gradinaru exercised her Fifth Amendment right to not incriminate

herself. She refused to testify regarding the theft of the drugs. VRP at 13-16.

The Administrative Law Judge issued an initial decision reversing the Department's finding of financial exploitation. AR at 37-45. The Department requested Board of Appeals review of the initial order because there were errors in both the findings of fact and the conclusions of law in the initial order. AR at 26-35. The Board of Appeals issued a Review Decision and Final Order, that reversed the initial order, and affirmed the finding of financial exploitation against Ms. Gradinaru for taking Elaine's morphine medication for her own use. AR at 1-12.

Upon review, King County Superior Court Judge Bruce Heller affirmed the Department's Review Decision and Final Order. Clerk's Papers (CP) at 41-43. Ms. Gradinaru now petitions this Court for review.

IV. ARGUMENT

A. The Court Reviews The Final Agency Order, Not The Administrative Law Judge's Decision

This matter is before the Court on appeal from a final agency order in an adjudicative proceeding under the Administrative Procedure Act (APA), Chapter 34.05 RCW. This Court's review is limited to a review of the agency's final order, not the administrative law judge's

initial decision. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 403-04, 858 P.2d 494 (1993) (commissioner's decision, not that of the administrative law judge, is the one that the court reviews); *Northwest Steelhead & Salmon Coun. of Trout Unlimited v. Dep't of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995) (agency head's findings, not ALJ's, are reviewed). Therefore, the order for this Court to review is the Board of Appeals' April 16, 2012, Review Decision and Final Order. AR at 1-12.

B. Standard Of Review

This Court applies the APA standards of review directly to the record made before the administrative agency. RCW 34.05.558; *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). With certain exceptions, not applicable here, review is confined to the record made before the administrative agency, and the Court may not consider new evidence. RCW 34.05.558-.562. The Court may grant relief from an agency order in an adjudicative proceeding only on the grounds provided under RCW 34.05.570(3).² *Tapper*, 122 Wn.2d at 402.

² Relief may be granted only if (a) the order or rule on which it is based is unconstitutional; (b) the order exceeds the agency's statutory authority; (c) the decision-making process was unlawful; (d) the agency erroneously interpreted or applied the law; (e) the order is not supported by substantial evidence in light of the whole record before the court; (f) the agency has not decided all issues requiring

Ms. Gradinaru has challenged the legal conclusion that her conduct meets the definition of financial exploitation. Appellant's Opening Brief (Opening Br.) at 1. The Court reviews de novo both the agency's conclusions of law and its application of the law to the facts. *Tapper*, 122 Wn.2d at 402-03. It can modify conclusions of law if the agency's review judge "erroneously interpreted or applied the law." RCW 34.05.570(3)(d); *Heinmiller*, 127 Wn.2d at 601. The Court may also substitute its legal judgment for that of the reviewing officer, so long as it accords "substantial weight" to the agency's interpretations of the law within its area of expertise. *Macey v. Empl. Sec. Dep't*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

Ms. Gradinaru has the burden of showing the invalidity of the Review Decision and Final Order. RCW 34.05.570(1)(a); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). The Court may grant relief only if it determines that she has been "substantially prejudiced" by the agency's actions. RCW 34.05.570(1)(d); *Peacock v. Pub. Disclosure Comm'n*, 84 Wn. App. 282, 286, 928 P.2d 427 (1996). Here, Ms. Gradinaru has not satisfied her burden of showing that the

resolution by the agency; (g) a motion for disqualification should have been granted; (h) the order is inconsistent with the agency's rules; or (i) the order is arbitrary or capricious. RCW 34.05.570(3).

Review Decision and Final Order erroneously interpreted or applied the law.

C. Estera Gradinaru's Actions Constitute Financial Exploitation

The Washington legislature has determined that vulnerable adults may be in particular need of protection from abuse, neglect, abandonment, or exploitation. *Kraft v. Dep't of Social and Health Services*, 145 Wn. App. 708, 717 (2008). The authority for a finding of financial exploitation against Ms. Gradinaru is within Chapter 74.34 RCW, the statute that deals with the protection of vulnerable adults. A finding of financial exploitation prohibits an individual from being employed in a capacity that would allow him or her to have unsupervised access to vulnerable adults. Former RCW 74.39A.050(8) (2011).³

Former RCW 74.34.020(6) (2010)⁴ defined "financial exploitation" as "the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any

³ This prohibition is now located at RCW 74.39A.056(2).

⁴ The definition of financial exploitation was expanded, effective July 22, 2011, to include the ability to make a finding against an entity and, to also make a finding against someone for improperly controlling or withholding property, income, resources, or trust funds. Therefore, the current definition of financial exploitation is "the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person's or entity's profit or advantage other than for the vulnerable adult's profit or advantage." RCW 74.34.020(6) (emphasis added). Three non-exclusive examples were also added to the definition. These amendments to the statute were effective after the agency action in this case and do not change the outcome here.

person's profit or advantage other than for the vulnerable adult's profit or advantage." The terms "advantage" and "profit" are undefined in chapter 74.34 RCW. When a statutory term is undefined, the court may look to a dictionary for its ordinary meaning. *In re Estate of Blessing*, 174 Wn.2d 228, 231, 273 P.3d 975 (2012).(internal citations omitted).

The dictionary definitions of advantage and profit are what the Department used to evaluate Ms. Gradinaru's conduct in finding that her actions constituted financial exploitation. The Board of Appeals defined "advantage" as "[a] benefit, gain, especially benefit resulting from some course of action". *Webster's Ninth New Coll. Dictionary* 59 (1987). See AR at 43-44. "Profit" was defined as "a valuable return: gain" or "to derive benefit." *Webster's Ninth New Coll. Dictionary* 939 (1987). See AR at 44. Taking Elaine's morphine benefited Ms. Gradinaru because, by stealing it, she was able to acquire or gain a medication for which she had no prescription, and use it for her own purpose.

Ms. Gradinaru contends that, while she did take Elaine's morphine and ingest it, her actions do not amount to "financial exploitation" because there is no profit or advantage to her committing suicide. Opening Br. at 5-6. Ms. Gradinaru also incorrectly claims it is undisputed that she was attempting suicide when she ingested Elaine's morphine. Opening Br. at 6.

While it is true that Ms. Gradinaru told hospital staff that she took the morphine in a failed suicide attempt, Ms. Gradinaru refused to testify at the hearing, and she did not clarify her exact purpose for ingesting Elaine's morphine. In a civil proceeding, a fact-finder may draw negative inferences when a witness refuses to answer on the grounds that her answer may tend to incriminate her. *Ikedda v. Curtis*, 43 Wn.2d 449, 458, 261 P.2d 684 (1953); *State Farm Fire and Cas. Co. v. Huynh*, 92 Wn. App. 454, 462, 963 P.2d 854 (1998). Here, the fact-finder could infer, from Ms. Gradinaru's refusal to testify, that she acquiesces to the factual allegations made against her. Further, the fact-finder could infer from Ms. Gradinaru's invocation of the Fifth Amendment that Ms. Gradinaru acknowledged that her actions may have been illegal.

Ms. Gradinaru's interpretation of the financial exploitation statute would require the Department to evaluate the motivations of caregivers even when they have clearly stolen something that belongs to a vulnerable adult. If the Department were required to determine a singular purpose motivating Ms. Gradinaru to take the morphine, the Department would have to guess at the multiple possible purposes that Ms. Gradinaru may have had for taking the medication.

Ms. Gradinaru made multiple references to Department investigators regarding her physical pain and the need to alleviate it.

Furthermore, Ms. Gradinaru's actions of taking the morphine, then immediately calling her ex-husband, may indicate that she was seeking attention as well. Finally, her statements to the hospital staff and investigators also indicate she may have been attempting to commit suicide. To reach the conclusion that Ms. Gradinaru committed financial exploitation, the Department did not have to determine which of these multiple possible purposes Ms. Gradinaru had when she took and ingested Elaine's morphine. Whatever Ms. Gradinaru's exact purpose, she furthered that purpose with her actions, and there is no contention that she ingested the medication to profit or advantage Elaine. In other words, taking the morphine gained her the opportunity to achieve whatever goal Ms. Gradinaru was pursuing, regardless of whether she wished to commit suicide, get attention, or relieve physical pain.

D. An "Advantage Or Profit" Does Not Require An Objectively Positive Outcome

Ms. Gradinaru contends that a finding of financial exploitation is an absurd result in this case because she was trying to commit suicide. This theory appears to be based on the concept that suicide is inherently self-destructive and cannot be considered a benefit or gain for a person, even if that individual wishes to die and steals a vulnerable adult's property to further that goal. *See* Opening Br. at 7-8.

It is true that courts should avoid absurd results so long as no harm is done to the words of the statute. *State v. Hall*, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010). However, it is not an absurd legal result to determine that the definition of financial exploitation includes when an individual takes and ingests a vulnerable adult's medication for a desired purpose, self-destructive or not.

To support a finding of financial exploitation, the benefit or gain that an individual receives when he or she illegally or improperly uses the property of a vulnerable adult does not need to be objectively positive. For example, Ms. Gradinaru has never disputed financial exploitation occurs where a caregiver takes and ingests a vulnerable adult's medication to feed the caregiver's own substance abuse. If taking and ingesting a vulnerable adult's medication for the self-destructive purpose of substance abuse, supports a finding of financial exploitation, then certainly doing the same thing for the self-destructive purpose of committing suicide must also qualify as a financial exploitation. Arguably, the act of stealing property from anyone, least of all a vulnerable adult, is objectively self-destructive because stealing can lead to many potential negative outcomes, like going to jail or being barred from working in certain settings. Simply because an action is

self-destructive, it does not become a defense to a finding of financial exploitation.

As described above, it is unclear what Ms. Gradinaru's intent was on the day she ingested the morphine. However, it is absolutely clear from the record that Ms. Gradinaru did in fact use morphine that belonged to a vulnerable adult in her care. Even if her motivation was suicide, as the April 16, 2012, Review Decision and Final Order correctly acknowledges:

The theft of morphine is more accurately analyzed through [Ms. Gradinaru's] mindset at the time of the theft, and whether she anticipated any benefit or gain. At the time of the drug theft, [Ms. Gradinaru] was in emotional and physical pain and wanted to commit suicide. By stealing Elaine's morphine, she gained an opportunity to reduce her pain and carry out her suicide decision. Because [Ms. Gradinaru] specifically acquired the morphine in order to gain this opportunity, it must be concluded that she financially exploited Elaine.

AR at 8-9 at Conclusion of Law 10.

E. Monetary Benefit Or Monetary Profit Are Not Required To Meet The Statutory Definition Of Financial Exploitation

Ms. Gradinaru further contends that her actions are financial exploitation only if the benefit or advantage that she received is "quantifiable in monetary terms." She asserts that to determine otherwise would eliminate the word "financial" from the statute, thus violating the canon of statutory construction that statutory terms should not be rendered

meaningless. Opening Br. at 8-10. This position ignores that “financial exploitation” is a term of art that is expressly defined in statute. It is an axiom of statutory interpretation that, where a term is defined, the Court uses the statutory definition. Only where a term is undefined will the language be given its plain and ordinary meaning. *U.S. v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). Therefore, “financial exploitation” means exactly what it is statutorily defined to mean: “the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person’s profit or advantage other than for the vulnerable adult’s profit or advantage.” Former RCW 74.34.020(6) (2010). The only defense articulated in the statute is if the profit or advantage is for the vulnerable adult. There is no other limit regarding the type of profit or advantage an individual must attain for the conduct to be financial exploitation. The statute does not limit the benefit or advantage to monetary benefits.

To support the position that any advantage or profit must be monetary, Ms. Gradinaru cites to two non-exclusive examples of financial exploitation that were added to the definition of financial exploitation more than two months after the preliminary finding of financial

exploitation was made against Ms. Gradinaru.⁵ Opening Br. at 9. Even if the non-exclusive examples in the 2011 amendments applied at the time a finding was made against Ms. Gradinaru, she only cites to two of the three new examples. The third new example, at RCW 74.34.020(6)(c), actually supports the position that the advantage or benefit does not need to be monetary.

RCW 74.34.020(6)(c) states that another example of financial exploitation is:

Obtaining or using a vulnerable adult's property, income, resources, or trust funds without lawful authority, by a person or entity who knows or clearly should know that the vulnerable adult lacks the capacity to consent to the release or use of his or her property, income, resources, or trust funds.

As the Review Decision and Final Order in this case correctly point out, Ms. Gradinaru's actions plainly fall within this example because she used Elaine's prescription morphine without lawful authority, knowing that Elaine lacked the capacity to consent to her use. AR at 8.

To the extent it could be considered error for the Board of Appeals to reference these examples because they were not part of the statute in effect when the finding of financial exploitation was made against Ms. Gradinaru, such error is harmless as the examples do not change that

⁵ The preliminary finding was made against Ms. Gradinaru on May 2, 2011. AR at 103. Amendments to the definition of financial exploitation, to include three non-exclusive examples, became effective on July 22, 2011. Laws of 2011, ch. 170, § 1 at 3.

Ms. Gradinaru's conduct fits the definition of financial exploitation in effect at the time she committed the acts. Error without prejudice is not grounds for reversal, and error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the case. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). The lack of any prejudice to Ms. Gradinaru regarding the use of examples is also demonstrated by the fact that, as described above, she cites to them as well.

V. CONCLUSION

Ms. Gradinaru took a vulnerable adult's medication for her own use. Regardless of whether she was attempting to commit suicide, or attempting to further some other purpose, she illegally or improperly used the property of a vulnerable adult to further that purpose. This

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Court should uphold the Review Decision and Final Order affirming the Department's determination that Ms. Gradinaru financially exploited a vulnerable adult.

RESPECTFULLY SUBMITTED this 16th day of August, 2013.

ROBERT W. FERGUSON
Attorney General


ANGELA COATS MCCARTHY
Assistant Attorney General
WSBA No. 35547, OID No. 91021
PO Box 40124
Olympia, WA 98504
(360) 586-6484

CERTIFICATE OF SERVICE

Christine Howell, states and declares as follows:

I am a citizen of the United States of America and over the age of 18 years and I am competent to testify to the matters set forth herein. On August 16, 2013, I served a true and correct copy of this **BRIEF OF RESPONDENT** and this **CERTIFICATE OF SERVICE** on the following parties to this action, as indicated below:

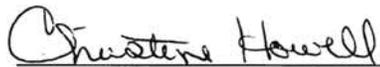
Counsel for Appellant

Christopher Black
Teymur Askerov
Law Office of Christopher Black, PLLC
705 Second Avenue, Suite 111
Seattle, WA 98104

- By United States Mail
- By Legal Messenger
- By Facsimile
- By Hand Delivery by: _____
- By Email to: crb@crblack.com & timaskerov@crblack.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 16th day of August, 2013, at Tumwater, Washington.



CHRISTINE HOWELL
Legal Assistant